IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 585

THE SINCLAIR COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITIONER

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA,

By LAMBERT H. MILLER,
General Counsel

FRED B. HAUGHT,
Assistant Counsel
918 16th Street, N.W.
Washington, D. C. 20006

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AUTHORITIES CITED

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With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as amicus curiae in support of the Petitioner.

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers is a nonprofit voluntary business organization composed of manufacturing concerns, including corporations, partnerships, sole proprietorships, and other forms of business enterprises located throughout the United States and its territories. Most of its members engage in interstate commerce and are therefore subject to the provisions of the National Labor Relations Act.

The Association has an interest in the proper resolution of the issues presented in this case because of the substantial effect, both immediate and potential, on the labor relations of its members.

This case is typical of many in which the National Labor Relations Board has ordered an employer to bargain with a union, although it was rejected by employees in a secret ballot election conducted by the Board, on the ground that the union had already been designated as majority representative before the election because it had obtained authorization cards from a majority of employees. In many other cases the Board has bypassed the election procedure and ordered the employer to bargain with a union holding such cards without an election.

This case is also typical of many in which the Board has based such bargaining orders at least in part on its conclusion that the employer coerced and restrained the employees by his communications designed to inform them of certain economic facts of life regarding business operations, and to give them truthful information about the union seeking to represent them.

Because the Board's card doctrine is frequently applied to compel employers to bargain with unions that

have failed or avoided the test of the secret ballot election provided by Congress, and because the Board's rulings on employer communications severely restrict the freedom of speech of employers and the right of employees to hear both sides, the issues in the present case are of major concern and importance to industry generally, including the members of this Association.

Since the facts of the case are set forth in detail in the Statement Of The Case in Petitioner's brief, they will not be repeated here.

SUMMARY OF ARGUMENT

1. Determination of the question whether a majority of employees in an appropriate bargaining unit want a labor organization to represent them under the National Labor Relations Act is an extremely important matter because the majority rules and the will of the majority is imposed on an unwilling minority of employees in the unit.

In the NLRA as originally enacted in 1935, Congress gave the National Labor Relations Board authority to determine the majority question by secret ballot of employees or "any other suitable method," and also authorized it to make that determination either in an unfair labor practice proceeding "or otherwise." When Congress adopted the Taft-Hartley Act in 1947, however, it was dissatisfied with the Board's use of authorization cards and other means in lieu of the secret ballot election to determine majority questions. Therefore it repealed the provisions that had authorized the Board to use such other methods and to make such determinations in unfair labor practice proceedings. In lieu of the former procedure, Congress provided for the filing of election petitions and made it

mandatory that when there is a question of representation the Board "shall direct an election by secret ballot and shall certify the results thereof." Again in 1959 in the Landrum-Griffin Act, Congress showed its repugnance for other means of determining majority status when it outlawed picketing for recognition and made special provisions for an expedited election to determine the majority question in such situations.

The Board largely observed this congressional intent during the 1950's, but in the 1960's it has adopted a practice of determining majority status on the basis of union authorization cards and giving unions bargaining rights based thereon. This amounts to an indirect certification of a union as majority representative on the basis of cards, thus accomplishing indirectly what Congress has forbidden the Board to do directly. In doing so, the Board has also resumed its former practice of determining majority status in unfair labor practice proceedings, although its authority to do so was revoked by Congress in the Taft-Hartley Act. The Board's practice thus exceeds its authority and is contrary to the statute and should be held invalid.

2. The Board's practice is also unsound, improper and contrary to policies of the Act in other respects. It is basically unsound because authorization cards are wholly unreliable as evidence of union majority status, a fact that is recognized by everybody, including the Board itself. Even if the authenticity of signatures on cards is established, there still remains the fact that they are frequently signed under pressures or because of misrepresentations and do not reflect the true wishes of employees. Moreover their traditional purpose has been merely to show that enough employees are interested to justify the Board in holding an election, and

the Board has had to give such cards a strained and false meaning not intended by the parties, when it uses them to determine majority status.

The Board's doctrine that an employer must recognize a union on the basis of cards if he does not have good faith doubt of its majority status practically assures bargaining rights to a union if it can acquire a majority of cards by any means. If the employer does not investigate their validity the Board concludes he did not have good faith doubt. If he does investigate he must interrogate employees and almost inevitably commit at least minor or technical unfair labor practices on the basis of which the Board is able to find he did not have good faith doubt.

The Board's practice also contravenes the Act's provision that extent of organization shall not be controlling in determining appropriate bargain units, because unions always demand bargaining on the basis of a unit in which they have obtained a majority of cards. The extent of organization is the controlling factor in determining the unit in such cases.

3. The Board's ruling in this case, as in many others, impairs the right of free speech protected by the Constitution and the statute. Here the employer communicated with his employees before the election through a series of speeches and letters and distribution of a book to inform them on economic facts of life and on documented facts about the Teamsters Union and certain of its officials. The Board found no threat or promise, but it ruled that the "totality" coerced the employees.

The Court of Appeals accepted the Board's totality finding on the theory that it should defer to the Board's

expertise and on the theory that it must accept the Board's finding if supported by "substantial evidence."

Thus a constitutional right—the highest and most inviolate form of right under our law—is restricted and impaired through a vague and meaningless "totality" finding that is upheld by a Court of Appeals out of deference to the expertise of a Board that has no special expertise in determining the meaning of words, and on the basis of mere substantial evidence that may be contrary to the overwhelming preponderance of evidence in the record. Constitutional rights should not be thus eroded.

ARGUMENT

1. The National Labor Relations Board Does Not Have Authority to Determine Majority Representation on the Basis of Authorization Cards and to Order Bargaining Based Thereon

Employees are guaranteed the right under Section 7 of the National Labor Relations Act to bargain collectively through representatives of their own choosing if they so desire, or to refrain from doing so if they prefer. The choice is made by a majority of employees in an appropriate bargaining unit, and if a majority do choose a representative it becomes the exclusive representative of all employees in the unit under the provisions of Section 9(a) of the Act.

Accordingly, the determination whether a majority want a representative is an extremely important matter, not only because it aids in effectuating the will of the majority but also because it imposes that will on an unwilling minority.

Under the National Labor Relations Act, as first enacted, known as the Wagner Act, the National Labor

Relations Board was authorized to make that determination by secret ballot, authorization cards or other means, under Section 9(c) which then provided:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

It will be noted that this section in its original form not only authorized the Board to determine majority representation by secret ballot or "any other suitable method," but also permitted it to make that determination either in conjunction with an unfair labor practice proceeding under section 10 or in any other kind of proceeding. Thus the Board was given broad authority to determine majority representation by any "suitable method" and in any kind of proceeding.

In reviewing the labor law and its administration in 1947, the Congress was highly dissatisfied with the methods the Board had used to determine majority choice. The Labor Committees of both the Senate and the House reported bills deleting the language of section 9(c) in its entirety and substituting a new procedure for determining representation questions by secret ballot election. The provisions of the Senate and House bills were substantially alike, and both provided for the filing of representation petitions by employees or by labor organizations or by employers. The

amendment to section 9(c) as finally adopted in the Taft-Hartley Act in 1947 provided that when a representation petition has been filed:

> "... the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

In explanation of this amendment, the House Committee Report (H. Rept. No. 245, 80th Cong., 1st Sess. (1947)) stated at page 7:

> "Important among the provisions of the bill are those that really assure to workers freedom in their organizing and bargaining activities. The old act purported to do this, but in the Board's hands it often had the opposite effect.
>
> "The bill prescribes rules for the new Board to follow in setting up units for collective bargaining and in holding elections to determine whether or not employees wish labor unions to bargain for them. These rules do away with practices of the old Board by which it has subjected literally millions of workers to control by labor unions notwithstanding that the employees did not wish the unions to represent them and voted against the unions in the Board's elections."

Again at page 35, the House Report explained that the new language of section 9(c):

> "... sets forth the procedure by which employers, employees, and representatives may ob-

> tain elections in which employees may determine whether or not they wish a representative to act as their exclusive representative, and, if so, which one."

In connection with the House bills's provision permitting the parties to waive hearing before the Board, which was adopted as section 9(c)(4) of the Act, this House Report made clear at page 39 that even in cases of waiver the Board must hold a secret election and cannot rely on cards:

> "The bill permits parties to waive hearings before the Board (providing no other interested person intervenes and objects), but when the parties waive a hearing, the Administrator must conduct a secret ballot, not check membership cards as the Board sometimes has done in the past."

Thus the Congress clearly indicated its intent that questions of majority representation should be determined by the traditional American method of secret ballot elections. The Board recognized this in its contemporary interpretation of the Taft-Hartley Act. Thus in discussing changes made by the new Act in its Annual Report for 1948, the Board recognized that:

> "Section 9(c) of the act, as amended, prescribes the election by secret ballot as the sole method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed (but rarely exercised) to utilize other 'suitable means' of ascertaining representatives." 13 *NLRB Annual Report* 32 (1948).

At the same time, in connection with the Taft-Hartley provisions which precluded the Board from certifying a union as representative if it had not complied

with the financial and non-communist filing requirements of then sections 9 (f), (g) and (h) of the Act, the Board recognized:

> "... that an order to bargain is often tantamount in practice to a certification of the union as bargaining representative and that, just as the Board may not issue a certification to a noncomplying union, so it should not issue an order requiring an employer to bargain with such a union." Id. at 49.

In fact, an order to bargain is not only tantamount to a certification of a union, it even goes a step further. In case of a certification, an order to bargain would not be entered unless and until the employer has refused to bargain and unfair labor practice proceedings have been conducted before the Board. Thus the order to bargain is one step farther along toward judicial enforcement than certification of a union after a secret ballot election.

The Board's present practice of ordering bargaining on the basis of authorization cards in a large number of cases accomplishes indirectly what the Congress prohibited it from doing directly—determining majority on the basis of cards. It has been labeled an "indirect certification" and is so recognized and utilized by unions. In a Handbook for Union Organizers, titled *Organizing and the Law* (BNA, Washington, 1967), by Stephen I. Schlossberg, General Council of the United Automobile Workers Union, the author points out:

> "The legislative history of Taft-Hartley makes it clear that this change *was intended to preclude Board certification on cards.* As this chapter will demonstrate, however, an 'indirect certification' on cards is possible through Board bargaining orders." (p. 82).

The author then demonstrates how this is accomplished. First, the union demands recognition on cards before going to a Board election. Second, after losing the election, it files charges of unlawful refusal to bargain based on the employer's preelection refusal of recognition. Third, "If the-refusal-to-bargain charge is successful, the Board order has the same effect as a certification, for it directs the employer to bargain with the union as the representative of the employees." (Id. at 87).

While the Congress in 1947 precluded the Board from determining majority status on the basis of authorization cards, it did not prohibit uncertified unions from seeking to force their recognition demands on employers by strikes and picketing unless another union was already certified. As this Court pointed out in *UMW* v. *Arkansas Oak Flooring Company*, 351 U.S. 62 (1956), unions could still strike to force recognition upon an employer without an election and certification. But Congress outlawed that method of obtaining recognition when it added section 8(b)(7) to the National Labor Relations Act in 1959. It made recognition picketing an unfair labor practice when continued beyond "a reasonable period of time not to exceed thirty days" without a representation petition being filed. It also provided an expedited election procedure for promptly resolving representation questions under such circumstances.

Thus again the Congress expressed its disapproval of forced recognition on the basis of authorization cards and clearly indicated its intent that questions of majority status should be resolved by a secret ballot election.

The Congress has left only one means of obtaining bargaining rights on the basis of authorization cards, namely voluntary recognition by an employer if he is willing to take the risks of granting such recognition. As this Court ruled in *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961), the employer's good faith is immaterial in such situations and if he grants recognition to a union that does not in fact represent a majority he is guilty of an unfair labor practice. The proper remedy, as the Court stated there, is an order preventing further recognition and directing an election to determine the majority question. We submit that that is also the only proper remedy where an employer declines to take upon himself the responsibility of determining majority status and refuses to grant voluntary recognition upon the basis of authorization cards.

As we will show later, for an employer to undertake an adequate investigation to determine the authenticity and validity of authorization cards is an extremely risky undertaking which almost of necessity involves detailed questioning of employees about the circumstances under which they signed authorization cards and almost inevitably results in unfair labor practice findings against him. The Board should be limited to the secret ballot election procedure provided by Congress and should not be permitted to place employers in the position of having to determine majority questions at their peril.

2. Even If Held Not Precluded by the Election Provisions of the Act, the Board's Present Authorization Card Doctrine Is Unsound, Unrealistic, and Contrary to Other Policies of the Act

The Board's practice of ordering bargaining on authorization cards began as a special and unusual remedy, or perhaps even a penalty, against employers in cases where the Board thought they had committed multiple and flagrant unfair labor practices and prevented free employee choice. It was at least tentatively accepted by a number of Courts of Appeals as an extraordinary remedy possibly justified on the basis of the Board's expertise. It was applied sparingly in only a few cases in the 1950's and accordingly any injustices involved in its application were limited to a relatively few instances.

In the 1960's, however, the Board began applying this procedure on a more widespread basis and has used it to give bargaining rights in hundreds of cases to unions, many of which had lost Board elections. It has now become a common method of obtaining indirect certification. As stated in Schlossberg's Handbook for Union Organizers cited above, "Because of the new, more liberal attitude of the NLRB toward card majorities, many unions have based their recognition demands on card majorities," (p. 87). The current practice was recently described by the Court of Appeals for the Sixth Circuit as follows:

> "No election was held; neither did the union seek one. It followed a now popular procedure of filing unfair labor practice charges against the company, having its claim of a bare majority sustained, and thus obtaining bargaining rights without an election." *NLRB* v. *Swan Super Cleaners, Inc.*, 384 F. 2d 609, 619 (1967).

As the Court of Appeals have come to realize that the Board has changed this from an extraordinary remedy to a common method for granting bargaining rights, they have become more critical and have refused to enforce the Board's bargaining orders in an increasing number of cases. They have noted that the practice assumes that authorization cards are a reliable indication of employee wishes, and that this is a wholly false and unwarranted assumption. Perhaps the most comprehensive statement of the unreliability of authorization cards is contained in the opinion of the Court of Appeals for the Fourth Circuit in *NLRB* v. *S. S. Logan Packing Company,* 386 F. 2d 562, 565, 566 (1967). That Court stated:

> "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks. This, the Board has fully recognized. So has the AFL-CIO. . . .
>
> "The unsupervised solicitation of authorization cards by unions is subject to all of the criticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited alone and in private, will sign an opposing petition, in each instance, out of concern for the feelings of the solicitors and the difficulty of saying 'No.' This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees and of potentially powerful union organizers may weigh heavily in the balance.
>
> "That is not the most of it, however. Though the card be an unequivocal authorization of repre-

> sentation, its unsupervised solicitation may be accompanied by all sorts of representations. 'We need these cards to get an election. You believe in the democratic process, don't you? Do you want to deny people the right to vote? Isn't it our American way to resolve questions at the polls? Do you want to deprive us of that right? Are you a Hitler or something?'
>
> "As the affidavits tendered by the employer in this case indicate, unsupervised solicitation of cards may also be accompanied by threats which the union has the apparent power to execute. . . ."

After discussing some of the threats commonly used by organizers and their effect of compelling employees to sign cards, the Court continued:

> "The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be non-conformist and antagonistic to friends and fellow employees. It is enhanced by the fact that usually, as they were here, the cards are obtained before the employees are exposed to any counter argument and without an opportunity for reflection or recantation. . . .
>
> "For such reasons, a card check is not a reliable indication of the employees' wishes."

The traditional purpose of cards ever since the adoption of the National Labor Relations Act has been to make a showing of interest to get an NLRB election, i.e., to demonstrate to the Board that enough employees are interested to justify it in holding an election (see 15 *NLRB Annual Report* 31 (1950)).

To support its new card doctrine, however, the Board has had to ignore the traditional purpose of such cards

and give then an entirely different meaning and significance. The Board has indulged in the fiction that such cards constitute a formal, legal, binding, written contract between the parties, at least to the exent of invoking the legalistic parol evidence rule of formal contract law which presupposes the existence of a contract between parties dealing at arm's length. Applying the parol evidence rule, if the wording of the card designates a union as representative, absent proof of fraud as gross misrepresentation the Board will not permit employees to testify that they did not intend the card to make the union their representative. In the Board's words, "subjective evidence as to the intent of the signers is irrelevant," *Bauer Welding & Metal Fabricators, Inc.*, 154 NLRB 954, n. 1 (1965), and to give consideration to such testimony of card signers is "but to ignore the proven wisdom of the parol evidence rule," *Dan Howard Mfg. Co.*, 158 NLRB 805, 807, n. 5 (1966).

Moreover, the Board will not let employees revoke their cards by any means less than formal written notice to the union. It has even refused to recognize revocation by written notice sent to the Board itself, even though employees were following advice of the Board's Hearing Officer in addressing their notice to the Board's office. *Arkansas Grain Corp.*, 163 NLRB No. 92 (1967). By requiring the employee to send written notice to the union, the Board forces him to expose himself to the very importunings and pressures by union organizers which he sought to avoid in the first place by signing the card.

Thus by treating the card as a formal contract the Board uses it to frustrate and pervert the prime purpose of the Act to determine the genuine free choice of

employees whether they want a union to represent them. It would hardly be possible to devise a practice more directly contrary to the purposes of the Act and more inconsistent with their effectuation.

Although an employer cannot help but have good faith doubt of a union's majority claim based on cards, the Board's doctrine places him in an impossible dilemma. If he does not investigate the validity of the cards, the Board considers his failure to do so an indication that he did not have good faith doubt. If he does investigate, on the other hand, he is treading the dangerous ground of questioning employees about organizing matters and it is virtually impossible for him to avoid doing something that the Board will find an unfair labor practice.

If the Board does find any unfair labor practice in such investigation, even of the most technical or minor nature, it then frequently holds that such unfair labor practice is evidence of the employer's bad faith. An excellent illustration is provided in *Dixie Cup Division of American Can Company,* 157 NLRB 167 (1966) where a union with authorization cards from 182 of the 304 employees in the unit lost a Board election by a vote of 81 to 200. The union then alleged that the company's communications had interferred with the election and it filed unfair practice charges and requested an order to bargain on the basis of cards. In investigating the validity of the cards and preparing its defense, the company's attorneys interviewed the 304 employees to find out whether they had voluntarily signed cards and whether any misrepresentations were made. This investigation disclosed, and the Board's Trial Examiner later found, that at least 4 cards were forged, 22 were signed by persons unknown, and 45

cards were obtained by threats or misrepresentation. When these cards were eliminated, the union did not have a majority and the Board could not order the company to bargain. However, it did find an unfair labor practice because "on at least three occasions employees in the course of interviews with Respondent's attorneys were questioned as to the identity of the persons from whom they received union authorization cards." Although these were obviously isolated instances which would inadvertently occur in practically any interrogation of a substantial number of employees, the Board found them sufficient to justify an unfair labor practice ruling against the company.

The Board's doctrine also collides with other policies of the Act relating to the determination of proper bargaining units. Union representation and collective bargaining can occur only in relation to an appropriate bargaining unit, and the determination of the appropriate unit is inseparable from the determination of majority status in that unit. When a union demands bargaining on the basis of cards, an employer frequently has doubts about the unit demanded by the union as occurred in the case here before the Court. Here the union made several different bargaining unit demands, varying all the way from the smallest unit of 14 wire weavers to a comprehensive unit of 87 production employees. Its final demand was the smallest unit of 14 wire weavers in which it had a majority of cards and in which it lost a Board election. The Trial Examiner and the Board found that the employer's doubts about the appropriateness of the union's various unit requests could not justify a refusal to bargain. In the words of the Trial Examiner whose decision was adopted by the Board, ". . . a good faith, but erroneous,

belief that a unit is inappropriate is no defense to a refusal to bargain."

It is obvious that the union in the present case, as in other card cases, demanded a unit based solely on its extent of organization—the unit in which it had a majority of cards and thought it could win an election. Thus the Board's card doctrine is custom-made to give unions bargaining rights in units determined solely on the extent of the union's organization. The practice of giving bargaining rights in such units flies directly in the face of the provision of section 9(c)(5) of the Act that "In determining whether a unit is appropriate for the purposes specified in section (b), the extent to which the employees have organized shall not be controlling."

The Board's card rulings usually contain, as in the present case, a pro forma recital that the employer's refusal to recognize the union was not based on good faith doubt but instead was motivated by a desire "to gain time in which to dissipate the union's majority." The majority referred to, of course, is that fleeting and evanescent majority of cards of questionable validity signed under unknown circumstances and for unknown purposes and reasons. The desire to gain time to dissipate that majority refers, of course, to the employer's desire to have a Board election in which employees will have an opportunity to hear both sides and to express their informed choice in the secrecy of the voting booth free from coercion or restraint from any source.

The Board's card orders also commonly contain a recital that the employer has made a fair election impossible. Usually, as in the present case, this recital is unsupported by any evidence or rationale. To arrive

at this point, the Board takes a curiously different view of employees from that which it uses to support the reliability of cards as evidence of majority status. In treating cards as reliable evidence, it regards employees as shrewd, sophisticated, fully informed in the intricacies of labor law, and unafraid of union coercion. To support its recital that an employer has made a fair election impossible, it views employees as naive, gullible, ignorant, and so timid that they are frightened by the mildest expression from their employer. Both extremes are wrong. It is unnecessary to view employees as anything other than what they are—normal, average citizens who vote in public elections and elect the President, Vice President and Congress of the United States and state and local public officials, and are accustomed to election campaigns and capable of evaluating campaign propaganda. When they are regarded as what they actually are, it is apparent that the secret ballot election provided by Congress is the only appropriate method of determining majority status in representation matters.

Although the Board normally makes the foregoing recitals, they are not essential to its doctrine of ordering bargaining on cards, accordingly, they are largely window dressing. Under the Board's doctrine, nothing more is needed than a Board finding that the employer refused to recognize a union having a majority of cards and that he did not have good faith doubt of the majority. In *H. & W. Construction Company, Inc.*, 161 NLRB 852 (1966), the Board was confronted with a case involving nothing more than a bare demand by the union for recognition on cards and a refusal by the employer. In the Board's words, "The charge did not allege that the Respondent had committed any other

unfair labor practices," and the Board found none. Nevertheless it ordered the company to bargain with the union on the basis of cards. One Board member dissented from this ruling that "a union with a demonstrated majority of cards *must* be recognized". 161 NLRB at 859.

The Board's authorization card doctrine has been the subject of wide controversy and there is extensive literature on the subject, much of it directed to side issues such as the recitals mentioned above which appear in the Board's decisions but are not really essential to its doctrine. One must agree with the comment of the United States Court of Appeals for the District of Columbia in its recent decision in *NLRB* v. *Henry I. Siegel Co., Inc.* (Docket No. 21,131, decided January 9, 1969) where a union obtained cards from 113 of the 182 employees and petitioned for a Board election in which it received only 48 votes out of 172 cast. In denying enforcement of the Board's order to bargain on cards, the Court of Appeals stated:

> "We regard as peripheral many of the propositions posed and debated so vehemently in the papers before us and in the extensive literature key-numbered under this heading. Such off-target inquiries include: Did the employer say this or did he say that to the employees? Did the Union organizers say definitely that an election would be held, or did they only clearly intimate it? Should these three votes be counted or should they not? Did pulpit expressions of the village priest really intimidate his parishioners or obstruct their freedom of action in a purely economic matter? If so, is the action of the priest to be ascribed to the company-employer? Did 51 per cent of the employees sign the cards or only 48½ per cent of them? Did the Union organizer *tell* the employees

> the purpose of the cards was to get an election, or did he only *intimate* that purpose? Did he say an election was *a* purpose, or *the* purpose, or the *sole* purpose? Did the president of the company say the plant *would* be abandoned, or did he say it *might* be abandoned? Were these three specified ballots valid or invalid? Who was afraid of what?"

It is submitted that the best answer and the only appropriate answer under the policies adopted by Congress is the secret ballot election for determining questions of majority status.

3. The Board's Ruling That the Company's Election Campaign Statements Coerced and Restrained the Employees Impairs the Freedom of Speech Guaranteed by the First Amendment of the Constitution and by Section 8(c) of the Act

During the campaign preceding the NLRB consent election, the company communicated with its employees through a series of letters and speeches designed to inform them on certain economic facts of life and on the character of the Teamsters Union which sought to represent them. The thrust of its statements may be summarized as follows:

1. It briefly recounted the history of the Sinclair Company, noting that it had formerly been a family-owned business, that it had been hurt financially by a 13-week strike some 15 years ago, that the business had not been highly prosperous and the family had been forced to sell control to Lindsay Wire Weaving Company of Cleveland, Ohio, and that like any other business it could not stay in business unless it made a profit.
2. That the character of the Teamsters Union reflects the character of its top officials, that a number of

top officers of the Teamsters Union have acted in their own private interest in handling union funds and in their conduct of collective bargaining and strikes, and the last two presidents of the union had been convicted of serious crimes in connection with their handling of union matters.

3. That if the employees voted in the Teamsters Union they could hardly hope to control its decisions and actions, and it might strike for unreasonable demands that could make the company's costs excessive and drive it out of business.

It would hardly be possible to make a more restrained statement of economic facts of life and of established facts about the union. They are the same kind of statements of which the Court of Appeals for the Second Circuit has said:

> "... statements as to the economic effect of unionization are the kind of speech protected by § 8(c). Rather than being threats of reprisals to be imposed because of the employer's anti-union bias, these remarks were a prediction as to the likely economic consequences of unionization. . . . Although the Board apparently thinks workers should be shielded from such disconcerting information, an employer is free to tell his employees what he reasonably believes will be the likely economic consequences of unionization that are outside his control, as distinguished from threats of economic reprisal to be taken solely on his own volition. Cf. Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harv. L. Rev. 38, 77-82 (1964). If § 8(c) does not permit an employer to counter promises of pie in the sky with reasonable warnings that the pie may be a mirage,

> it would indeed keep Congress' word of promise to the ear but break it to the hope." *NLRB* v. *River Togs, Inc.*, 382 F.2d 198, 201, 202 (1967).

The Board could not point to any threat in any of the employer's communications, but it ruled that the "totality" of his communications restrained and coerced the employees.

The Board's "totality" is a meaningless term in this connection. No one knows what it means. It would seem that if it means anything it must mean all of the employer's communications added together. And yet the Board did not mean all of the communications. The totality of the employer's communications included distribution of copies of Senator Robert F. Kennedy's book, *The Enemy Within,* in which the author reported on certain union abuses and criminal conduct of certain union officials disclosed in hearings of the Senate Select Committee on Improper Activities in the Labor or Management Field, also known as the McClellan Committee, of which the author had been Chief Counsel. After that fact was noted and commented on in the public press, the Board issued a Supplemental Decision adding a footnote explanation that it did not mean to include "distribution of the book 'The Enemy Within' as a part of the totality of the Respondent's conduct in violation of Section 8(a)(1) of the Act." (A. 204)

The only difference between the separate communications of the employer and their totality in this case is mere repetition, because the employer restated the same economic facts and facts about the union a number of times. We submit that speech does not lose its constitutional protection because of emphasis by repetition.

The employer's communications here did not even approach the limits of protected free speech as those limits were recently stated by this court:

> ". . . cases involving speech are to be considered 'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.'" *Linn* v. *United Plant Guard Workers,* 383 US 53, 62 (1966).

And yet the Board selected a sufficient number of isolated statements out of the employer's communications to constitute "substantial evidence," gave them its own meaning under its "expertise," and ruled that the "totality" coerced employees and was an unfair labor practice. The Court of Appeals accepted the Board's ruling on the theory that the question was whether the Board's findings "are supported by substantial evidence" and its theory that interpretation of the employer's statements "is a question essentially for the specialized experience of the Board."

We submit that the Board should not be permitted to abridge constitutional freedom of speech on the basis of findings based merely on "substantial evidence" which may be contrary to the overwhelming preponderance of the evidence in the record, and interpretations of the meaning of an employer's statements made in the exercise of so-called expertise by a Board whose members are not even required to have legal training and often do not. The Board has no special expertise in determining the meaning of language, and the courts with their training and experience are far more capable in this area than the Board.

We submit that, at a minimum, constitutional freedom of speech should not be limited on the basis of any-

thing less than a preponderance of the evidence and a full review of the meaning of an employer's statements by qualified judges unhampered by any "substantial evidence" rule or by any requirement of deference to findings made by the Board.

If freedom of speech is not given at least this minimum protection, it will continue to be abridged by action of an administrative agency under a law made by Congress, through a process which this Court has described:

> "... unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines* v. *United States*, 371 US 156, 167 (1962).

The constitutional right of free speech should not be subjected to this kind of rule.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be reversed and an order should be entered setting aside the order of the Board.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA,

By LAMBERT H. MILLER,
General Counsel

FRED B. HAUGHT,
Assistant Counsel
918 16th Street, N.W.
Washington, D. C. 20006.

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